**Editor's note: 79 I.D. 636**

KENNECOTT COPPER CORPORATION

IBLA 71-43 Decided October 6, 1972

Appeal from decision of Anchorage, Alaska, state office, Bureau of Land Management, which rejected trade and manufacturing site purchase application.

Affirmed.

Alaska: Generally--Alaska: Possessory Rights--Alaska: Trade and Manufacturing Sites--Statutory Construction: Generally

The Act of April 29, 1950, requiring the filing of a notice of location or a purchase application before an occupant of a trade and manufacturing site can be given credit for his occupancy, does not work an unlawful forfeiture of an occupancy right.

Alaska: Generally--Alaska: Possessory Rights--Alaska: Trade and Manufacturing Sites--Withdrawals and Reservations: Generally

A claimant's occupancy of a trade and manufacturing site prior to a withdrawal does not establish a "valid existing right" excepted by the withdrawal where credit for his occupancy prior

to the withdrawal cannot be given under the Act of April 29, 1950, because the claimant did not file a notice of location or purchase application prior to the withdrawal.

Conveyances: Generally--Public Lands: Disposals of: Generally

Private agreements do not control the disposition of federal public land. Rights to federal lands must be gained by compliance with the governing federal public land laws.

Alaska: Generally--Alaska: Possessory Rights--Alaska: Trade and Manufacturing Sites--Conveyances: Generally

Any right under a notice of location required by the Act of April 29, 1950, is personal to the claimant filing the notice. A transferee of the claimant's possessory interest in a trade and manufacturing site cannot claim under his transferor's notice to avoid the effect of a withdrawal where the transferee had not filed his own notice or purchase application prior to the withdrawal.

APPEARANCES: Eugene F. Wiles, Esq., of Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, Alaska, for appellant.

OPINION BY MRS. THOMPSON

Kennecott Copper Corporation, hereinafter termed Kennecott, has appealed from a decision of the Alaska state office, Bureau of Land Management, dated August 13, 1970, which rejected its application to purchase a trade and manufacturing site, F-034646, on the Kobuk River, Alaska, for the reason the lands were withdrawn.

Kennecott's application described the same land as that in a notice of location and settlement for a trade and manufacturing site filed by Thomas A. Packer, on July 6, 1965, and identified the claim by Packer's serial number F-034646. Kennecott also submitted a quit-claim deed dated July 10, 1965, to it from Packer conveying all interest which he had "if any," and all interest which he might thereafter acquire in the land described in the trade and manufacturing site notice of location.

The Bureau's office held that Kennecott did not obtain any rights under the location notice which Packer had filed, and that the land was withdrawn from appropriation and disposition by Public Land Order No. 4582 prior to the time (July 6, 1970) Kennecott filed its application to purchase. Therefore, it rejected the application.

The issues in this case relate to the effect of the withdrawal and the pertinent statutes involved here. Public Land Order No. 4582, 34 F. R. 1025 (January 23, 1969), withdrew:

> Subject to valid existing rights * * * all public lands in Alaska * * * from all forms of appropriation and disposition under the public land laws * * * for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska. * * *

Under section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970), not more than 80 acres of land in Alaska can be purchased by one:

> * * * in the possession of and occupying public lands in * * * Alaska in good faith for the purposes of trade, manufacture, or other productive industry, * * * upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry. * * *

The Act was amended by section 5 of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), requiring a notice of occupancy to be filed in a land office within 90 days from initiation of the claim. It then provides:

> * * * Unless such notice is filed in the proper district land office within the time prescribed the

> claimant shall not be given credit for the occupancy maintained in the claim prior to the filing of (1) a notice of the claim in the proper district land office, or (2) an application to purchase, whichever is earlier. Application to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the notice of claim under this section.

Kennecott never filed a notice of location and its purchase application was filed approximately a year and a half after the withdrawal. Nevertheless, it contends that it has occupied the site since 1965 thereby initiating valid rights under the trade and manufacturing site law which could not be affected by the withdrawal. It contends that the site was excepted by the language of the withdrawal as a "valid existing right". If we assume, arguendo, that Kennecott's occupancy of the tract was in compliance with the trade and manufacturing site law, can that occupancy be considered as a "valid, existing right" within the meaning of the withdrawal in light of the language of section 5 of the Act of April 29, 1950, quoted above?

Appellant contends that the Act of April 29, 1950, does not affect its rights here, and bases this contention on two major arguments. The first argument is an interpretation of the Act of April 29, 1950, so as not to take away any rights a claimant may have had by virtue of occupancy of public land. The second, alternative, argument,

is to the effect that Kennecott, by purchasing Packer's possessory interest in the claim, should be allowed to receive credit for Packer's prior location notice and be allowed to purchase the land under such notice.

With respect to the first argument, appellant contends that the interpretation of the Act of April 29, 1950, to deny its application, as reached below, is contrary to previous holdings of this Department. It cites the decision of James Morris, 47 I.D. 326 (1920), as upholding the validity of a settlement claim over a withdrawal even though the law in that case, section 3 of the Act of May 14, 1880 (21 Stat. 140, 141), 43 U.S.C. § 166 (1970), required a claim to be made of record within a time period, and it allegedly was not. The Morris case is distinguishable from our case. In that case, it was determined that the claimant had filed an application within the time required, albeit he withdrew it and filed a different application which the decision stated could have been treated as an amended application. More importantly, however, the terms of the withdrawal and the Act prescribing the recordation of the claim are couched in terms far different from those in this case. The withdrawal expressly excepted settlement claims, and the Act of May 14, 1880, expressly allowed a homestead settler

> * * * the same time to file his homestead application and perfect his original entry in the United States Land Office as allowed on May 14, 1880, to settlers under the then existing preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under such preemption laws.

In our case, the withdrawal did not expressly except occupancy or settlement rights, but "valid existing rights". 1/ The Act of April 29, 1950, enacted thirty years after Morris, expressly provides a sanction that no credit will be given for the occupancy "maintained in the claim prior to the filing of (1) a notice of the claim * * *, or (2) an application to purchase, whichever is earlier." In view of these differences, the Morris case has no precedential significance. Cf. United States v. Hurlburt, 72 F.2d 427 (10th Cir. 1934), involving the same language of withdrawal and statutes as in the Morris case, emphasizing that unsurveyed land could be withdrawn by the Government although it was occupied by a settler, but that the settler's rights depended upon the language of the withdrawal and his compliance with the law. See also, Russian-American Packing Co. v. United States, 199 U.S. 570 (1905), holding that the United States may withdraw land from entry and

1/ As shown infra, even if the withdrawal excepted occupancy or settlement rights, the terms of the Act of April 29, 1950, control.

sale even though it may defeat an inchoate right of a settler, as the mere occupancy of land does not create a vested right against the United States. As stated by the Court, at 575, "* * * the mere settlement upon public lands without taking same steps required by law to initiate the settler's right thereto, is wholly inoperative as against the United States."

Appellant also contends that an interpretation of the Act of April 29, 1950, that prior possessory rights will be lost by the failure to file a location notice or application to purchase, would be contrary to the general rule of law that forfeitures are not favored. It asserts that the legislative history of the Act shows that it was passed merely to provide the Government with information needed in the administration of public lands and was not passed "to work a forfeiture on prior valid possessory rights of claimants".

It is true that the Act of April 29, 1950, as discussed in Anne V. Hestnes, A-27096 (June 27, 1955), and Loran John Whittington and Chester H. Cone, A-28823 (August 18, 1961), cited by appellant, had the primary purpose of providing this Department with information concerning claims to public lands. Obviously this purpose would not be met if a claimant could present his application to purchase long after a withdrawal had been in effect claiming his occupancy precluded the withdrawal from being effective even though he gave no

notice to the Bureau, as required. A literal reading and application of the language of the Act of April 29, 1950, comports with the legislative purpose of the Act rather than some forced interpretation which, in effect, would obviate any filing of a notice of location or purchase application prior to a withdrawal of the land.

Furthermore, there is no merit to appellant's contention that the Bureau's interpretation of the Act works an unlawful forfeiture on its "prior valid possessory rights". The Act was passed years before appellant's alleged occupancy of the site began. The provisions of the Act in amending the Trade and Manufacturing Site Act established certain conditions and requirements whereby the United States would recognize occupancy for trade and manufacturing site purposes. The failure of the appellant to meet these conditions brought into operation the consequences of the lack of fulfillment of the condition, i.e., that occupancy prior to the filing of a notice of location or application to purchase could not be considered. See Albert L. Scepurek, A-28798 (March 27, 1962). As stated in Ickes v. Underwood, et al. 141 F.2d 546, 548 (D.C. Cir. 1944), "[t]he Government may dispense its bounty on such terms as it sees fit." See also Lutzenhiser v. Udall, 432 F.2d 328, 331 (9th Cir. 1970).

The Act of April 29, 1950, is also akin to recording statutes prescribing statutes of limitations for enforcing rights. Such statutes affecting existing property rights are not considered as working unlawful forfeitures upon the existing rights where they allow time for compliance. They have been upheld as constitutional by the Supreme Court. See, e.g., Vance v. Vance, 108 U.S. 514 (1883). See also John Martin Pearson, 70 I.D. 523 (1963), denying a protest by a conflicting claimant in Alaska to a headquarters site on the ground the protestant failed to bring a quiet title action in a court of competent jurisdiction as required by section 10 of the Act of May 14, 1898, 30 Stat. 413, 414, and holding that he, therefore, lost whatever rights to the site he might otherwise have had. Compare the requirements of the Scrip Recordation Act of 1955, 69 Stat. 534, 43 U.S.C. § 274 note (1970), which provided that existing scrip and selection claims had to be recorded in this Department or they would not be accepted as a basis for the acquisition of land. If the scrip documents are filed after the time prescribed, this Department has followed the Congressional mandate and refused to recognize any rights to public lands thereunder. M. B. Waldron, A-28703 (January 31, 1962); Patricia R. Williams, A-28160 (February 2, 1960). In Udall v. Battle Mountain Company, 385 F.2d 90 (9th Cir. 1967), cert. denied, 390 U.S. 957, the Court discussed the Scrip Recordation Act, saying at 96,

> * * * Congress's principal purpose was to secure information. In the absence of clear expression we cannot conclude that it intended, on the basis of information yet to be disclosed, to obligate itself in any fashion beyond its already existing commitments.

This rationale seems pertinent here.

We conclude that we must follow the mandate expressed in the Act of April 29, 1950, not to give any credit for the occupancy of the appellant prior to the time it filed its purchase application. Therefore, its occupancy of the tract prior to the withdrawal cannot be considered a "valid existing right" excepting the tract from the withdrawal. Russian-American Packing Co. v. United States, supra.

We must also reject appellant's alternative argument that as the transferee of Packer's possessory interest in the land, it should be allowed to receive credit for Packer's location notice. It cites Carroll v. Price, et al., 81 F. 137 (D. Alas. 1896), as authority for the proposition that possessory rights in federal lands may be conveyed from one person to another. It argues that under that ruling the conveyance included all of the rights to the land including the right to claim the notice of location and settlement. That transfer of possessory interests in federal lands and improvements thereon as between private parties may be made and recognized in court determinations

of the possessory rights of such parties between themselves is not questioned. Carroll v. Price, however, does not support any argument that transfers between private parties control the disposition of public land from the United States. They do not. The Supreme Court in Tarpey v. Madsen, 178 U.S. 215, 221 (1900), has said:

> * * * notwithstanding this recognition of the rights of individual occupants as against all other individuals, it has been uniformly held that no rights are thus acquired as against the United States. * * *

That opinion goes on to state that rights to federal lands must be gained by compliance with the governing federal laws. Where, as in that case, the law required a declaration of a right under the preemption laws to be filed in a land office, a claimant's mere settlement on land without the filing of such a declaration, was not sufficient to defeat a subsequent grant of the land. Any right under a notice of location required by the Act of April 29, 1950, is personal to the party filing the notice. In it the claimant must certify, under penalty of law for making false statements, to the truthfulness of the statements made therein. The statements required include information which would show whether a

claimant is qualified under the law to acquire the site, such as his citizenship and majority. The notice also asks the date "settlement or occupancy was made by you". Packer's notice of location did not show that the notice was being made in behalf of anyone other than himself. No other person is entitled to any rights under that notice of location as it was personal to Packer. Therefore, Kennecott can claim no rights by virtue of Packer's notice. 2/

We note that a notice of location is not by itself sufficient to except land from a withdrawal, as it is the act of occupancy under the pertinent law which creates the rights. Vernard E. Jones, 76 I.D. 133, 136 (1969). Since, however, as ruled above, Kennecott's occupancy of the tract prior to the filing of its purchase application may not be considered, it was proper to reject its application filed when the land was withdrawn. 3/

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2/ This ruling pertains to transferees and assignees of a claim, but is not to be considered as a ruling on the rights of the heirs of an entryman.

3/ We note further that the plat of the trade and manufacturing site submitted by appellant in support of its application to purchase depicts an area within the site identified as "Native Cemetery". Public Land Order No. 2171, dated August 3, 1960 (25 F.R. 7533), withdrew public lands used for native cemeteries from appropriation under the public land laws. The extent of any such conflict may not be determined from the record, and need not in view of our conclusion reached above. However, such a determination would be necessary before any disposal of the land could be made. The Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688, terminated Public Land Order No. 4582, as modified, but does not affect our disposition of this purchase application.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (1972), the decision appealed from is affirmed.

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Joan B. Thompson, Member

We concur:

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Edward W. Stuebing, Member

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Frederick Fishman, Member